United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

74-1694

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United States Court of Appeals
FOR THE SECOND CIRCUIT

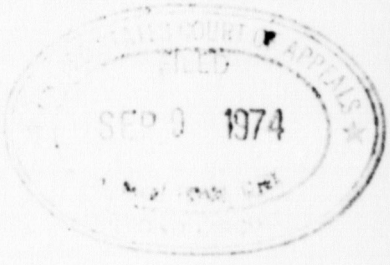
TITAN GROUP, INC.,

Plaintiff-Appellant,

against

HAROLD FAGGEN,

Defendant-Appellee.



SUPPLEMENTAL JOINT APPENDIX
Comprising Court's Findings of Fact and Conclusions of Law as Corrected

POWERS AND GROSS,
Attorneys for Plaintiff-Appellant,
110 East 59th Street,
New York, N.Y. 10022.

SHEIB, SHATZKIN & COOPER,
Attorneys for Defendant-Appellee,
235 East 42nd Street,
New York, N.Y. 10017.

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proposed findings and conclusions with citations therein and I believe it is to the interest of everybody involved, counsel, litigants and perhaps even the Court if this case is resolved at the trial level.

There will follow what shall be deemed my findings of fact and conclusions of law pursuant to Rule 52 FR Civil P.

Under contracts closed on December 2, 1968, the plaintiff Titan acquired from the defendant four companies known as Harold Faggen Associates, Inc., Actuarial Tabulating Corporation, Employee Fund Services Corporation and Fund S & E Corporation. Specifically, of course, Titan acquired the capital stock of these four companies from defendant Harold Faggen in consideration for the issuance to him by Titan of $5.5 million worth of convertible debentures bearing interest at four percent per annum.

Although the convertibility details varied slightly, suffice it to say, the debentures would be convertible by Faggen at an average price of $19 a share.

In the fall of 1968 as I understand the evidence, the common stock of Titan was trading at roughly from 15 to 17-1/2 points.

In May 1972 after a prolonged period of bicker-

ing between the parties, Titan notified Faggen it would no longer pay interest then due and owing on the debentures. At about the same time, it commenced this suit in this court seeking recision of the contracts and money damages.

Based upon claims of violations of the Securities Exchange Act of 1934, 15 U.S.C. Section 78J(b) and Rule 10b-5 thereunder 17 CFR 240.10B-5.

Defendant reciting the default on the notes has counterclaimed to recover the full value of the debentures plus outstanding interest.

I propose to treat first the negotiations and other events prior to and leading up to the closing on December 2, 1968.

Titan is a comparatively small conglomerate which in 1968 was basically in the real estate and construction business. With the boom market of that year, Titan was very interested in acquisitions of other companies. Then as now, it was in an exceedingly tight cash position. Moreover, at that time and over the years to date, Titan has sustained several changes in equity control and even more changes in top management.

Early in 1968, Titan had come under the dominance of what is known and as was referred to in this trial as the Block group. That group installed Anthony

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Frank as president of Titan in the spring of that year. Benjamin Robinson then as now a New York lawyer although not literally a member of the Block group was and continued to be chairman of the board of Titan. A long standing associate and business acquaintance of his was the defendant Harold Faggen. Harold Faggen is a law graduate, albeit, as far as I can determine, he has never been a practicing lawyer. He is also a certified public accountant and actuary and his field of expertise, basically, has been in the accountancy profession.

In 1968 he was the successful owner and executive head of an actuarial business. The core of his business success then was the acquisition and retention of many clients, particularly unions and union pension and welfare funds.

Essentially at that time the bulk of his business was done under the name and style of Harold Faggen Associates, Inc. As indicated heretofore, however, Faggen also did business through three other corporations, the stock of which he owned and those corporations I named earlier.

As stated, he and Ben Robinson had close business and professional contact. Indeed, several of the unions and pension funds represented by Faggen as an

actuary happened also to be represented by Robinson or his firm as counsel.

When Frank and the Block group came into the picture in early 1968, Frank who had been a California real estate operator and his board of directors were interested in acquisitions. This is not surprising because if you will recall and certainly this Court takes judicial notice of the fact that 1968 was one of the peak years of conglomerate activity and acquisition activity and there was a relatively boom market in that year.

A friend and associate of Frank at the time was Edmund Kaufman, a Los Angeles lawyer and member of the law firm of Irell & Manella. Kaufman purported to be and in fact I deduced was a specialist in mergers and acquisitions.

In 1968, the Faggen companies had enjoyed a very strong cash and liquid asset position. In particular, their actuarial business, albeit relatively small perhaps from certain points of view was nevertheless very successful.

Not surprisingly, therefore, Harold Faggen had received a number of overtures for the acquisition of his business or a merger from such substantial firms as

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Price, Waterhouse and more particularly, Levin Townsend and Diebold Corporation. Thus, in the second quarter of 1968 with the assistance of a man named Rogoff working for Diebold who prepared projections of income for the Faggen companies which among other things recognized distinctions between accounting for private firms and for public firms, Faggen made presentations to these companies just mentioned.

In the course of these discussions, particularly with Levin Townsend and Diebold, it appeared that these firms had suggested, albeit not firmly offered figures from five million to seven million to acquire the Faggen companies. Faggen discussed these conversations and tentative negotiations with his friend Ben Robinson, who list little time in putting Faggen in touch with Anthony Frank. Both Robinson and Frank made it reasonabbly clear to Faggen that Titan would be interested to acquire his companies. As a result, Frank had Kaufman come to New York from Los Angeles and take up discussions with Harold Faggen. Their first meeting of substance came on September 6, 1968 in the Robinson law offices on Park Avenue, New York City.

As far as I can tell, no specific price was discussed of certainly was not negotiated that day between

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Kaufman and Faggen, but it does/appear that Kaufman looked over what is in evidence as Exhibit 1 in whole or in part, a set of projections prepared in large measure by Rogoff and Faggen.

More than that, Kaufman looked over the tax returns of the Faggen companies for 1968. They discussed in general the acturial business and the prospects for the Faggen companies, at least in theory, in the field of data processing.

A much more significant and detailed meeting occurred thereafter on October 2, 1968, also in New York. Frank was apparently present at this meeting for a relatively brief time but Faggen and Kaufman were the principal participants. Faggen and Kaufman went over the Faggen company tax returns for the previous four or five years. They also appeared to have discussed the balance sheets at least to the extent of the cash position or net worth of the Faggen companies.

There then followed another meeting on October 6 and this one was principally concerned with conversation between Frank and Faggen; and at the request of Frank, Faggen delivered to him, Frank, a handwritten memorandum of a brief narrative and statistical summary

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of accounts of the Faggen group and their employees at least in terms of numbers.

There was also apparently a pro forma which was prepared by Faggen or someone in his organization which was part of that exhibit, which we know as Plaintiff's 2. Frank thereupon proceeded to have that particular document typed up and that is in evidence as we know it as Plaintiff's 3.

Going back to October 2, it appears that at the conclusion of that meeting, both Faggen and Kaufman shook hands on a tentative deal which would be subject to board approal and the workingout of specific details by financial and legal representatives, particularly of Titan.

Now, it would also appear, although it is not entirely clear because of certain equivocal testimony both by Mr. Kaufman and in my judgment Mr. Faggen, that it was at the October 2 meeting that Kaufman took the income for 1968 and estimating the adjusted pre-tax income from those figures to be about $550,000, negotiated Faggen down from a price originally suggested by Ben Robinson of about $7 millon when he first talked

to Frank and Faggen about this matter. As Kaufman put it, therefore, he negotiated Faggen down to a price of $5.5 million in convertible debentures. Though much has been made of this figure and how Kaufman relied upon it, I think his principal reliance was to get Faggen down to that amount even though he may have used the figures as plaintiff argues, and it was a technique perfectly acceptable among professionals in order to get a rough approximation which in turn would lead to a good price.

Although Kaufman may have been understood to claim otherwise in his testimony at this trial, it is specifically found that he did not rely really in any way on the so-called projections of earnings which we know as Plaintiff's 1, nor did he rely really on what is called the pro forma attached to Plaintiff's 3. First of all, he didn't have that pro forma Plaintiff's 3 because that didn't appear until the October 6 meeting.

Second of all, even assuming he was reading the same figure, for example, of 1968, which does appear on Plaintiff's Exhibit No. 1, the so-called Faggen-Rogoff projections, I don't think that Kaufman relied on those at all in coming to a handshake tentative agreement with Harold Faggen. The reason for this are many, but I can

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summarize briefly at this moment to say that Kaufman understood full well that this was a deal which was attractive because it was an acquisition and it looked as though the actuarial business might be put together very neatly with some of the mortgage and real estate business which Titan was already into, and that possibly there was a chance for some data processing melding which in the future would be potentially exciting and profitable. More than that, I think Kaufman was bemused as many other persons were bemused by the strong asset and cash liquid asset position of the companies of Harold Faggen.

Now, as stated on October 6, Frank, , as he put it, got very excited about the figures, most particularly in respect to the net worth of the Faggen companies. Also as Frank put it, he was excited about the possibilities that might be made or put into effect once the Faggen group was merged into Titan to build upon the computer capacity such as it was of the Faggen companies.

Frank was also aware, as was Kaufman, that Ben Robinson, chairman of the board wanted this deal and therefore he wanted to do the best he could to see to it that this deal was sold to the board of directors.

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I believe that largely for this reason, he asked Faggen to prepare a presentation and give it to him the following day and as indicated, this was done and as a result, Plaintiff's 3 came into being.

Two days after October 7 and on October 9 was held the board of directors meeting which, inter alia, took up the question of the Faggen group acquisition.

According to plaintiff in this lawsuit, the board members relied heavily on the pro forma of earnings which were typed up and incorporated in Plaintiff's 3 in evidence but this claim is substantially undercut by a number of other matters of evidence in this case. To begin with, although the plaintiff argues otherwise, the minutes of that board meeting by no means indicate that this was so. Beyond that, the plaintiff called a number of director witnesses, that is, witnesses who had been directors in the fall of '68 at the time when Titan made this acquisition. Only one of these witnesses, Frager, recalled any discussion of earnings at all at this meeting and he wasn't particularly explicit on just exactly what was said and even if I am wrong on that, it is abundantly clear from any fair reading of Frager's testimony, that this wasn't as important as such other facts as the fact that Chairman Robinson

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wanted this deal and that Titan was in a cash position of a very tight nature and here was an acquisition which would pick up between $1 and $1.3 million cash.

Now, it is true, however, that at that board meeting, Frank had with him Plaintiff's Exhibit 3. It is also true that he did not physically distribute this to the board members. The only evidence that any board member ever saw this document within its four corners is the testimony of Witness Hegy, a member of the board who was not present at the October 9 meeting. He was away, he came back after the board voted on this acquisition and Frank did present to him for his consideration and reading the exhibit which we know as Plaintiff's 3.

Obviously this had nothing to do with the decision of Titan to acquire the companies because Hegy only read it after the fact.

Suffice it to say that the board of directors on October 9 voted to acquire the Faggen companies subject to investigation and approval of the financial and other details by the executive committee of Titan and by the Robinson firm in respect to legal matters.

Of considerable interest and importance is

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the fact that between October 9, the date of the board of directors meeting and the date of the closing December 2, 1968, two financial and accounting employees of Titan Messrs. McIntyre and Russo, checked into the financial data and records of the Faggen companies. Although it could be argued that each of these gentlemen, particularly Russo, have taken a markedly different position in connection with their testimony in this trial, or prior to trial in depositions, it is certainly beyond any serious dispute that at the time, that is, at the time between October 9 and December 2, the closing date, they raised no quarrel or difference of opinion with the figures submitted by Faggen or any of the books and records which they had a chance to look at.

While all this was going on, the Robinson firm representing Titan and Mr. Simon Sheib of the firm of attorneys representing Faggen in this very lawsuit negotiated the contract as a formal matter after Kaufman out in his office in Los Angeles, apparently, had prepared a first and rather rough draft. This draft was mailed by Kaufman back here to New York to a Mr. Rosen, I think, in the Robinson law firm. In the course of the lawyer's work, it was agreed Titan would buy the Faggen companies against the tax returns for the

last five fiscal years of those companies and also against the unaudited financial statements of the companies prepared by Joseph Warren Company, a certified public accountancy firm, for the quarter ending September 30, 1968.

I should say parenthetically, but importantly, as it is, the plaintiff has not even attempted to offer or if they have, offered any persuasive evidence that those particular contract document financial statements as set forth in paragraph 3 of the contracts of acquisition contain anything of significance or materiality which was false or misleading at the time they were made.

After the changes in the contracts were made and the negotiations between Mr. Sheib for Harold Faggen and the Robinson firm for the corporation and after Russo and McIntyre had made such inquiries and studies as they made, it appeared that the executive committee of the corporation must have approved this, although the record is notably thin, if not indeed virtually silent, on just what the executive committee did do as a formal matter for Titan, once the board meeting of October 9 had been completed.

The closing took place in any event without any difficulty on December 2, 1968.

Almost literally within a week or two after the closing, I should note that a employee of some ten years of the Faggen group, a man whose job was called a consultant, and he was one of five or six consultants to the Faggen group, by the name of Tabor quit his employment and took with him some of the clientele of the Faggen group. Harold Faggen brought this to the attention of other management of Titan and not long thereafter, a suit was commenced by Titan against Tabor and his new employer which was none other than the Levin Townsend firm, by the way, and with not too long a delay, that litigation was settled rather profitably it seems to me whereby the defendants paid approximately 260 or $265,000 to Titan.

As 1969 arrived, events seemed to move along at first smoothly enough but then later that year, as the stock market started downwards, the problems of Titan and all of its activities appeared to become more apparent and binding.

As far as the record shows, the actuarial business of the Faggen group as it was literally called by the Titan executives, continued to do a strong business. Kaufman by this time had become chairman of the board since he was part of the so-called Block group.

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It is true that there is evidence that Kaufman in 1969 became somewhat dissatisfied with the data processing efforts of the Faggen group. In a sense you could argue that this is curious because Kaufman himself as I understand the proof had been told by Faggen in September or at the very latest on October 2, that there would be a flat year for the Faggen group in the data processing end because of the start-up costs and new hardware expenses among other things.

I think the same warning incidentally had been conveyed by Faggen in the presense of Anthony Frank. In any event, Kaufman seems to have been a little unhappy as he was unhappy about a down-turn of business in virtually all of the divisions of the Titan group.

In the meantime, also, as 1969 went along, Kaufman himself began to engage or, I should say, encounter heavy weather in arguments in the Titan group family. Indeed, he finally left Titan as chairman of the board in the spring of 1970 and he did not leave in what I would call an aura of good feeling. He was then succeeded by none other than the aforementioned Mr. Frager of St. Louis as chairman of the board and then there was a gentleman for a period of a month or two by the name of Rosen,

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Harry Rosen and finally and unhappily as event turned out from the Harold Faggen selfish point of view, Mr. Robert James Frankel became chairman of the board. Frankel had first come into contact with Titan througha friend of his who was a member of the Robinson law firm. This was in the spring of 1969. Frankel was successful in negotiating the sale to Titan of a construction company of his known as Soverign Construction Company. He was elected as a director of Tian in 1970 at the annual meeting ofthe stockholders and not long thereafter, in February of 1971, Mr. Frankel became chairman and chief executive officer of the Titan group. Not surprisingly, since he assumed the latter office, he came smack up against one of the usual bugaboos of the Titan group, lack of cash. At about the same time he met Harold Faggen and in all places, the Yale Club, and immediately he tried to get Faggen and his so-called Faggen group to cast up more cash for the parent company. At least in human terms, it is not surprising to learn that Faggen reminded or pointed out to Frankel, that Titan had acquired at least $2 million worth of cash and marketable securities after the Titan group had acquired the Faggen companies

Indeed, between 1968 and 1972, Titan withdrew at least $2.1 million in cash and securities from the Faggen Companies, and that therefore he was not at all enthusiastic in weakening the Faggen group

operations by contributing more cash.

Partly because of Faggen's adamance in this position, Frankel in April 1971 sought to prevent Faggen from being re-elected to the board of directors. This I am sure did not endear Frankel to Faggen and I surmise there were some personal differences between the men which are, from what I infer from the evidence and see from their demeanor in the courtroom, probably understandable on both sides. Even more important, perhaps, Frankel ran up against another difficult problem and that was how to pay the interest at 4% which was falling due from the Titan group to Harold Faggen on his convertible debentures.

In May 1971, therefore, Frankel sought, as he testified, to have Faggen see to it that the Faggen group took out of their coffers cash to pay Faggen personally on his notes. Faggen was notably unenthusiastic about this, according to Mr. Frankel and I assume this is correct and as a matter of fact, in the summer of 1971, there were special board meetings and other conversations of an informal nature devoted to the problem as Frankel saw it of the interest due to Faggen on his notes.

Relationships were not advanced by the initial

fact that it was during this period that Frankel asked Faggen to cut back on his data processing business and not acquire new clients for that kind of business unless those new clients were willing to underwrite their own start-up costs.

Thus by the fall of 1971 at the very latest, relations between Frankel and Faggen, to put it kindly, were strained. Indeed, Frankel was already casting around for information and legal assistance so that he could make claims against Faggen and Benjamin Robinson.

In December 1971, Harold Faggen's employment contract which was executed as part of the acquisition of the Faggen companies expired by its terms and Frankel with admitted reluctance extended Faggen on a month-to-month basis only. To make matters even worse, nature intervened in the form of exposing Faggen to a rather serious illness which required him to be operated upon and thus away from the business for a significant period of time in the winter of '71, '72.

The handwriting it seems to me was then on the wall and in April 1972, Faggen found himself no longer a member of the board of directors of Titan and as heretofore indicated in May of 1972, the Titan group commenced this suit after they had notified Faggen that

they were no longer going to pay any interest on his notes.

Now, briefly summarized, plaintiff's principal contention in this federal court litigation is that Harold Faggen made knowingly false material statements concerning the financial and business facts of his four companies upon which Titan relied prior to the execution of the contracts on December 2, 1968 in acquiring the capital stock of these Faggen companies in exchange for $5.5 million worth of convertible debentures issued to Faggen.

Put differently, in lawyers' terminology of a simple kind, plaintiff claims there was fraud in the inducement and that this was not only a violation of Rule 10b-5, but it was also common law fraud of the most egregious nature.

Specifically, Titan contends that the income figures set forth on the pro forma attached to Plaintiff's 3 in evidence were knowingly false in a materially significant way. According to Titan group, its accounting experts who have testified at trial and who prepared various financial documents and computations relating to the condition of the Faggen companies in the year 1965 to and including 1968, which computations were

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made of course after the commencement of this lawsuit, have proved that the figures submitted by Faggen in what we call Plaintiff's Exhibit 3 to be materially false and intentionally so to the knowledge of Faggen.

In addition, Titan makes a number of other contentions, some of which this Court regards as bordering on the absurd as follows:

Faggen was and is guilty of a conflict of interest in that he did not advise the Titan negotiators and representatives that Ben Robinson had represented him or his companies as a lawyer and that there had been a long relationship whereby they both represented the same unions or the same union pension funds.

Additionally, it is claimed that Faggen falsely stated that he and his companies had in being, a model for a computer program for the pension plans of small accounting firms, small law firms and their clients.

Additionally it is alleged that Faggen falsely covered up the fact he had lost substantial clients in 1968 and there was a clear danger of losing other major clients in the foreseeable future.

On the other side of the coin, the defendant has contended that there is no truth in these allegations as a matter of fact. Beyond that, the defendant has

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claimed that this suit is time barred. Defendant has also claimed that plaintiff has no right to prove anything that went on before the contracts were signed because of the parol evidence rule or because as it is sometimes put, that whatever negotiations took place between Faggen on the one hand and Kaufman and Ben Robinson perhaps, and certainly Anthony Frank, merged into the formal contract documents.

Now, although as will be seen hereinafter I have considerable difficulty in finding that plaintiff has proved by a preponderance of the evidence that Faggen made knowingly false material statements or purposely withheld material information which was necessary to make the picture complete in his negotiations with Titan group, this Court concludes that Titan by its officers and directors did not rely substantially upon any of the information which plaintiff now claims that it did, but before we get to these ultimate conclusions of fact and conclusions of law, I want to take up two points which were argued eloquently in the course of the argument.

First of all, as you gentlemen know, the Court specifically raised the question of jurisdiction. Suffice it to say basically that I agree with the

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plaintiff. I believe the plaintiff has proof sufficient to show jurisdiction. In more detail, as we know, the Courts have interpreted very loosely the requirement of the statute on Rule 10b-5 that an instrumentality of interstate commerce or the mails be used directly or indirectly and as good a case as any in this court recently is a case called Heyman versus Heyman at 356 F. Supp. 958, decision by Judge Bauman.

Here as Mr. Powers accurately pointed out, I believe there is ample evidence of use of mails and of interstate phone calls between Kaufman and Frank perhaps on the one hand and Faggen on the other. More than that, certainly I think every inference should be to the effect that Faggen well knew that there would be use of the mails between Los Angeles and New York and that there would be use of the phone in arranging the particulars of this transaction. Therefore, I think the plaintiff is clearly correct and that this Court has jurisdiction under the statute on Rule 10B-5 in that sense.

The other point I would like to take up now is the very interesting and much more difficult argument of the defense based upon the statute of limitations and perhaps laches as well.

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I can well understand the position of the defendant on this score because there is ample evidence from which one might infer that the plaintiff Titan group wasn't misled or lulled at all. As a matter of fact, if one looks at the records, let alone the testimony, as late as March of 1970, Titan group was representing to the world through its annual reports and materials filed with the Commission, I assume, but at least in its annual report, that this was an arm's length deal which Titan group had investigated carefully before they made these contracts with Harold Faggen. Moreover, we have the evidence already discussed that McIntyre and Russo looked into this and never thought that anything was wrong and never told anybody that anything was wrong.

Still further, as defense counsel argued this morning, if all of these things were as terrible as has been argued here, you would have thought that the defection of Tabor within a matter of days after the contracts were signed, if there was really any lulling, might have made the management sit up and take note.

On the other hand, from all of that, I still end up siding with the plaintiff. I think there is

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suffient here to show that a federal court, of course, in the first instance must look to New York law since the statute does not have any limitation period. Once it does that, it doesn't willy-nilly end up with the contract provisions saying that March 31, 1970 is the absolute cut-off for any claim or suit in connection with this acquisition.

I think I should give the plaintiff the benefit of the doubt for such reasons as, presumably, as plaintiff argues, it really wasn't until Frankel came in that the management possibly was sufficiently independent from the power of Ben Robinson and Harold Paggen to really look into this.

I also think a federal court would as a policy matter, be unwilling to give literal effect to that application of the contract provision in question even though that is supported by a provision of New York Statutory Law, but I think the federal policy considerations would be more weighty, that a federal court ought to decide the merits rather than taking the technical position under these circumstances that a plaintiff is forever cut off absolutely as of March 31, 1970.

In any event, I side with the plaintiff on this issue and think that it is appropriate to turn to

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merits, but I will say that it is a very interesting and closer question than perhaps I at least initially thought it was when I first heard it from Mr. Cooper when this case was first assigned to me.

I might point out in order to determine when the statute of limitations begins to run, the Courts have held that Federal law must be applied, and that is one of the good legal reasons why I think the argument of the plaintiff in this respect probably ought to carry the day.

In other words, the first exercise is to look to the appropriate precise limitation period and there we look to the law of New York.

The next step, of course, as just stated, is to determine when that statute of limitation period begins to run and there I think the case agree that Federal law should be applied.

Given the liberal Federal policies in this area, I think the better view is to favor the plaintiff and say that this case is not time barred by the statute of limitations. That is not to say, however, that some of the laches arguments or the argument by the defense that this is nothing but a contrived lawsuit should be totally ignored when this Court turns to the merits.

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There are a variety of reasons why I think reliance or lack thereof is the key to this case. As we have all agreed in the course of colloquy and argument; this is not a case brought by a shareholder of a public company who had no benefit of face-to-face dealings with the contract or the contracts in question. As was pointed out in Chris Craft Industries vs. Piper Aircraft, Second Circuit 480 F2d 341, 371, Cert. Denied 414 U.S. 910 (1973), where the transaction is accomplished through impersonal dealings such as on a stock exchange or for some other reasons the factors that influence the parties are not readily apparent, the decisions have discussed liability in terms of the materiality of the misrepresentations. This is sometimes referred to as the objective standard and has also been used in class or injunctive actions, but in individual damage actions as I read the cases, proof of reliance, is still required. As good a case as any on this is List versus Fashion Park, 340 F. 2d 457, 462 Cert. denied 382 U.S. 811, (1965). There it was held that the individual plaintiff must show both that he relied on past misrepresentations and that a reasonable investor would have relied.

The fact that the plaintiff was an experienced

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and successful inventor was taken into account in List.

A similar case is the Third Circuit decision Kohn versus American Metal Climax, 458 F. 2d 255, 290.

In any case, whatever the circumstances and facts may have been in all the case law that we know of and certainly in the two cases I cited, if here there was a case where reliance ought to have to be proved by a preponderance of evidence, it is here. We had sophisticated parties. Indeed the balance of sophistication and know-how rested heavily in favor of the plaintiff, Titan group. This was a face-to-face deal and even Titan group as late as early 1970 was telling everybody in the world who would read their annual reports that this was so. It was put on a proxy statement in that year and that document, of course, was distributed to the public after approval, presumably, byt ehe by the Securities and Exchange Commission.

I am totally unpersuaded or I certainly am not persuaded by a preponderance of the evidence that there was any such great reliance as Titan group now argues on the pro forma attached to Plaintiff's Exhibit 3. I believe the real reliance was in quite different areas, such as number one and perhaps most importantly,

the fact that the Faggen group seemed to have a good going business which nobody even to this day denies was the fact and that it had a very strong net worth.

Two, I think the major reliance was on the good word of chairman of the board Ben Robinson who at least at that time was a highly respected and potent force on the Titan board.

Three, I think that none of us can ignore the clear intent of particularly the Block group as represented on the board and I dare say every other member of the board to not only get Titan in a better cash position, but to make acquisitions and grow, grow, grow. 1968 was a big conglomerate year, generally, and the Titan board of directors was no exception to what was going on at that particular time.

Four, I think there is some truth in what the plaintiffs argue but I don't draw the adverse conclusions that plaintiff does. I think there was considerable interest as Anthony Frank said in trying to put together the actuarial business with the mortgage and real estate business of the Titan group already existing and more than that, to build a data processing operation which would meld both the actuarial, accountancy and mortgage and real estate details in the same operation,

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but I don't think Frank for one minute assumed or was told by Harold Faggen that that capacity already existed in the Faggen groups. I don't think for one minute Anthony Frank failed to understand that the computer hardware and existing programming in the Faggen companies was comparatively small and unsophisticated and that is that.

I don't think that the Titan group had the slightest interest, really, in the details of the numbers of clients and whether they were inter-related clients in the sense that the unions quite obviously had something to say of who or what firm would be accountants for the union pension funds. I don't think that anybody cared the slightest about that. Everybody was relying on the know-how of Ben Robinson, who after all had considerable union business which he brought into his law firm, and Harold Faggen seems to have similar and maybe even better business from an accountance point of view and that is all anybody cared. Whether it was 140 clients or 70 clients and whether Harold Faggen had lost ten percent of his clients the year before or was about to lost 20 percent of his clients, they couldn't care less and nobody kidded anybody on that score.

As far as conflict of interest is concerned, although I

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really believe the plaintiff has effectively abandoned that argument, that is a reductio ad absurdum.

No one was bemused about the close relationship between Robinson and Harold Faggen. That is part of the reason the deal was sold and that is part of the reliance.

Second of all, there is nothing wrong in the law or in the canons , if there are any canons available, and they certainly weren't made available to the Court at the trial,in the accountancy industry, but I will take due note of the fact that it is unlikely there are any canons which would say that it is wrong for an accountant to deal with a lawyer and in effect, each of them bring business one to the other.

Second of all, even if I assume that this ridiculous argument is factually correct as advanced by the plaintiff, I can only say that in 1968, if all those facts had been known to the board, it may have even whetted their appetite more than it was already whetted for these particular acquisitions.

As I think Mr. Powers finally came down to it today, everything except the figures is totally unpersuasive, even to the plaintiff's knowledge. Sadly enough, I can understand this. There is no doubt that

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Mr. Frankel found Faggen a difficult man to deal with. I don't blame Frankel for that. I can surmise that Faggen is a little bit feisty and difficult and was probably a prickly rose to put it kindly, once he and Frankel started toargue over the interest due and the data processing business as Frankel saw it, as opposed to how Faggen saw it, but I am afraid that all of that has permeated this lawsuit. Both sides have been assiduous in covering each other with mud and like everybody else,we are dealing with human beings and there is a lot of mud around for both sides, particularly post-acquisition, but that doesn't help the proof of the plaintiffs case except in respect to perhaps the figures.

I have already held that the figures, really, are meaningless, at least to the extent that they were relied upon as plaintiff argues. However, I think in fairness, these figures out to be discussed and analyzed a bit.

It has been stated that Plaintiff's 1 contained and in fact it does, contain the 1968 income pre-tax for the Faggen companies to be about $571,000. That is true. Those schedules which Rogoff and Faggen prepared do show that.

I accept the argument of the defense, however,

that Kaufman really didn't rely on this at all. Kaufman also understood, because he saw the tax returns, that there had to be significant adjustments made because on the one hand the Faggen groups were wholly-owned or private companies and therefore their accountancy and tax reporting methods necessarily were different than those of a public company such as Titan.

More than that, despite whatever he may have inferred at trial, certainly Kaufman knew that these figures probably embraced income earned from investments of about $1 million or slightly more in the portfolio of marketable securities held in the name of these Faggen companies rather than by Faggen individually.

We have heard a great many arguments and the witnesses have all been asked under direct and cross the significance of the handwriting that appeared on certain copies of Plaintiff's Exhibit 3, that is, more particularly on the page which we know is the pro forma page and what is meant by "excludes investment income."

The plaintiff argues strenuously that this phrase written in the handwriting at one point of Mr. Ben Robinson and at another point by Mr. Frank indicates beyond peradventure that Faggen told these gentlemen that the pro forma figures excluded earned income from

securites.

I am sorry to find flatly that there is no persuasive proof to that effect whatsoever. Admittedly, the picture is not entirely clear, but the plaintiff has the burden of proof here as it does across the board on its claims and I am more inclined to think that in the case of Robinson, although his testimony was a bit fudgy and cloudy on the point, that he really wrote that phrase down because he wasn't sure what these figures included, and as to Frank, I think he did the same thing. He wanted to find out and make sure and I am by no means convinced by a preponderance of the evidence that Harold Faggen told them orally otherwise.

As a matter of fact, if you look at the tax returns and you look at the other figures, it is virtually impossible for this Court to assume that the plaintiff could possibly be right on this argument because I cannot see how you could get $571,000 on any other basis except including investment income for the year 1968. Particularly so-called adjustments having to do with the over funded pension account, T & E, salaries of Harold Faggen and Rose Dogan

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which Titan group understandably submitted ought to be reduced and the like.

Though the picture is not as clear as a selfish matter you would like to see it as a finder of facts, I am certainly not persuaded that the plaintiff's version of all of this is in fact correct.

Thus, the reconstructed figures of the accountants who worked on this matter and who testified for plaintiff at this trial are suspect because they made certain assumptions in this area which I do not find supported clearly in the evidence. Not only that, although Mr. Powers is correct, I believe in suggesting that when Frank and Kaufman and Faggen were talking prior to October 9, 1968, they both were mixing up both accrual methods of accounting and cash methods almost necessarily. There is nothing wrong with that. It doesn't follow from that that the accountants who did the post-litigation commencement work here were following the same methods which the Faggen company books were kept on at the time of the negotiations in the fall of '68.

Not only that, as indicated, I think they made certain assumptions about the adjustments and certain assumptions about income from investments which are not clearly supported.

Finally, I can only note that this puts us in a position where we are comparing apples with oranges, which is not very persuasive evidence in my judgment in an important matter or question as to whether or not there was a material misrepresentation of the financial data shown on the pro forma.

I would be less than fair to plaintiff if I didn't admit there is a possibility that upon reconstruction using slightly different accounting methods, one could establish from an accountancy point of view that the figures advanced by Faggen in the fall of 1968 didn't prove out to the dollar. That I think is probably true, but I think any shrinkage from the $571,000 was far less that what plaintiff here claims which is the difference between some $404,000 and $571,000.

All of this is really of esoteric interest as it is because I cannot be at all persuaded that this is what was really relied upon by sophisticated bookkeepers like Russo and McIntyre -- McIntyre put it very well in saying in effect that; "our real concern and only concern was to look at enough to make sure that these pro forma figures were within the ballpark." Plaintiff has not satisfied me by a preponderance of the evidence that the figures

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were anything but in the ballpark and no one has shown me or no one has even attempted to show this Court that anybody tried to bamboozle Russo and McIntyre. I own to the fact that some of Harold Faggen's ideas of tax return preparation and reporting of individual income taxes do not accord with my notions as to how these things should be done. For example, I am not entirely sure that the T & E deductions that his records show or his companies' records show were entirely supportable from a private firm point of view, but again, this is all really meaningless because I don't think anybody in Titan group could have cared less about all of this detail in the fall of 1968.

Now, there is one other point I want to make and that is this. Mr. Powers, and the plaintiff have argued consistently if you look at page 2 of Plaintiff's 3, or the corresponding page on Mr. Faggen's handwritten version thereof, a real fraud appeared in the following language and I quote from paragraph 2 page 2, dropping the first clause of the sentence, "We are in the process of programming completely automated pension plan calculations for small and medium sized employers. We expect to provide these services to stock brokers, accountants and lawyers only."

I will assume at least arguendo that he was at least guilty of a little modest puffing but on the other hand, even accepting that construction of this language, I read it to indicate the fact, namely, that they didn't really have any completely automated program for pension plan calculations for small and medium sized employers, and as already indicated, I find specifically that Frank put this construction on this language and on any oral conversation he got from Harold Faggen. As Faggen understood and I don't blame him, I think I would have reacted the same way, this offered exciting possibilities, but that is all it offered. A further point on this; it wouldn't have made much sense for Harold Faggen to say as he did and Frank I think conceded this, that look, 1969 will be a flat year in the data processing end because we will have all these start-up expenditures and new hardware expenditures, and, therefore, I am afraid this is one of the gossamer arguments of the Titan group in this lawsuit.

On the basis of these findings and conclusions, I determine that there is no proof by the plaintiff by a preponderance of the evidence that the defendant Faggen was guilty of any scheme or artifice to defraud or that he made any untrue misstatement of a material

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fact or he omitted to state a material fact necessary in order to make the statements in fact made in the light of the circumstances under which they were made not misleading.

Therefore, the defendant is entitled to judgment dismissing the claims of the plaintiff and as our argument this morning indicated, there is no other defense to the notes. Therefore, the counterclaim which Harold Faggen asserts is granted and he is entitled to judgment on his counterclaim.